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~~No. 15,087~~

United States Court of Appeals  
For the Ninth Circuit

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SUN-MAID RAISIN GROWERS OF CALIFORNIA,  
a Corporation,

*Appellant,*

vs.

CALIFORNIA PACKING CORPORATION, a  
Corporation,

*Appellee.*

BRIEF OF APPELLEE  
CALIFORNIA PACKING CORPORATION

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MARSHALL P. MADISON,

JAMES MICHAEL,

GEORGE A. SEARS,

225 Bush Street,

San Francisco 4, California,

*Attorneys for Appellee California  
Packing Corporation.*

PILLSBURY, MADISON & SUTRO,

*Of Counsel.*

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IN THE

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**BRIEF OF APPELLEE  
CALIFORNIA PACKING CORPORATION**

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**JURISDICTION.**

The district court had jurisdiction to enter its order denying the motion of defendant Sun-Maid Raisin Growers of California to dissolve the injunction (28 U.S.C. 1332; *United States v. Swift & Co.* (1932) 286 U.S. 106).

This Court has jurisdiction to review the order of the district court (28 U.S.C. 1291).

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**INTRODUCTION.**

Defendant has appealed (R. 113) from the order of the district court (R. 112) denying the motion of defendant



(R. 83-84) to dissolve a permanent injunction entered on June 15, 1936, pursuant to mandate of this Court (R. 74-81).

The fragmentary statement of the case by defendant in its opening brief (pp. 2-4) does not fairly present the facts and background of this extended litigation. Particularly noteworthy is the failure of defendant to review the prior proceedings before this Court which resulted in the original issuance of the permanent injunction.

The motion of defendant to dissolve the injunction rests upon a single alleged change of circumstance—plaintiff's sale in 1950 of its rights of ownership in the trade-mark "Sun-Kist" (Opening Brief of Defendant (hereinafter cited as "Op. Br.") 21; R. 171-178). Defendant's entire argument proceeds upon the theory that the contract of March 10, 1917 (R. 15-21), which settled and defined defendant's rights of ownership in the trade-mark "Sun-Maid" as limited to use on raisins and raisin products only, was a covenant ancillary to plaintiff's ownership of rights in the trade-mark "Sun-Kist." All of defendant's assertions that plaintiff either necessarily relinquished its rights under the 1917 contract when it sold its rights in the trade-mark "Sun-Kist" (Op. Br. 10-14) or that, if plaintiff retained its rights under the contract, the contract became an illegal restraint of trade (Op. Br. 15-21), are based upon the ancillary covenant theory.

This theory of defendant is in the teeth of (a) the findings of fact of the district court (R. 109-111), (b) the original decision of this Court directing that the permanent injunction issue (*California Packing Corporation v.*



*Sun-Maid R. Growers* (9 Cir. 1936) 81 F.2d 674), and (c) the prior decision of the Court of Customs and Patent Appeals respecting defendant's limited rights of ownership in the trade-mark "Sun-Maid" (*California Packing Corp. v. Sun-Maid Raisin Growers* (Ct.Cust.& Pat.App. 1933) 64 F.2d 370). The findings of the district court, consistent with those prior decisions, are that plaintiff's rights under the contract of March 10, 1917—and its rights to continued protection by the injunctive decree—did not and do not depend upon plaintiff's ownership of rights in the trade-mark "Sun-Kist."

Defendant has merely seized upon the irrelevant circumstance of plaintiff's sale of those trade-mark rights to make a renewed attack upon the contract of March 10, 1917, which this Court has previously held binding upon defendant. The district court properly refused to lend its hand to defendant's latest scheme to evade its contract obligations and to claim rights of ownership in the trade-mark "Sun-Maid" to which it has never been entitled.

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#### **STATEMENT OF THE CASE—THE HISTORY OF THIS LITIGATION.**

Plaintiff California Packing Corporation brought this action for an injunction permanently restraining defendant from using the trade-mark "Sun-Maid" on non-raisin products in violation of its limited ownership rights therein established by a written contract dated March 10, 1917 (R. 12, 15).

Prior to 1917, predecessors in interest of plaintiff and defendant were engaged in trade-mark litigation in New

York, the claim being that the "Sun-Maid" mark "was and is mistaken for and confused with the trade-mark 'Sunkist' " (R. 16, 7-8, 43-44). That litigation was settled by an agreement of March 10, 1917 (R. 15-21). Defendant's predecessor agreed to use the "Sun-Maid" mark "*only* on packages containing raisins or on packages containing food products or confections made wholly or in part from raisins"<sup>1</sup> (R. 18). In consideration thereof, the pending suit was dismissed and plaintiff and its predecessor agreed not to further dispute the defendant's rights in the trade-mark "Sun-Maid" as so limited to raisin products (R. 17-18). The contract also provided for continuance of certain agreements and leases between the predecessors of plaintiff and defendant relating to the packing and selling of raisins and facilities therefor (R. 15-18).

Defendant thereafter acquired its predecessor's business, including its rights in the trade-mark "Sun-Maid," in a bankruptcy proceeding (R. 47, 69). Despite the limited rights it acquired, defendant endeavored to register the trade-mark "Sun-Maid" for products other than raisin products. Plaintiff successfully contested such attempted registration. The Court of Customs and Patent Appeals held that, as a consequence of the 1917 contract, defendant had ownership rights in the "Sun-Maid" mark for use on raisin products only, and that it accordingly could not register the mark for any other product (*California Packing Corp. v. Sun-Maid Raisin Growers* (Ct. Cust.&Pat.App. 1933) 64 F.2d 370). The court said (p. 373):

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<sup>1</sup>Unless otherwise indicated, emphasis is ours throughout this brief.

“In an opposition proceeding, where ownership of a mark in the applicant is challenged, registration cannot be allowed without first determining that question. If an applicant has *by contract divested himself of ownership* of and the right to use a mark for which he makes application for registration, he is not the ‘owner’ of the mark.”

And the court concluded (pp. 374-375):

“It is our opinion that appellee [defendant] is bound by the terms of said contract, and \* \* \* under the contract, appellee is not the owner of the [“Sun-Maid”] mark, and was precluded from using the same as applied to such [nonraisin] goods.”

In violation of the contract and its defined ownership rights in the trade-mark, defendant commenced using the “Sun-Maid” mark on nonraisin products, and in 1929 plaintiff brought this injunction suit to prevent such use. The district court initially refused to enjoin defendant (*California Packing Corp. v. Sun-Maid Raisin Growers* (S.D.Cal. 1934) 7 F.Supp. 497). Plaintiff appealed and this Court reversed, directing that a permanent injunction issue (*California Packing Corporation v. Sun-Maid R. Growers* (9 Cir. 1936) 81 F.2d 674).<sup>2</sup> Pursuant to man-

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<sup>2</sup>It may be noted that the district court made findings of fact in connection with its original conclusions of law and decree dismissing plaintiff’s complaint (R. 67-73), including a finding that there was no confusing similarity between the trade-marks “Sun-Kist” and “Sun-Maid” (Finding 16, R. 71), on which finding defendant now seeks to place some reliance (Op.Br. 3). Defendant ignores the fact that the district court vacated its original decree, and the findings and conclusions on which it was based, pursuant to mandate of this Court (R. 78, 93, 102). The final decree entered herein, approved as to form by the attorneys for defendant, granted the injunction as prayed for by plaintiff in the complaint (R. 77-79, 91-92).

date of this Court, the district court entered its final decree dated June 15, 1936, perpetually enjoining defendant from asserting rights of ownership in the "Sun-Maid" mark beyond those established by the 1917 contract (R. 74-81).

In approaching the problem of whether an injunction should issue, this Court stated the primary question as follows (81 F.2d 676):

"The primary question in the case is whether or not the appellee Sun-Maid Raisin Growers of California is bound by the contract of March 10, 1917."

Holding that defendant could not enjoy the benefits of the 1917 contract but escape the corresponding burdens, this Court said (81 F.2d 676-677):

"[Defendant's predecessor] could not convey any right to the use of a trade-mark which it did not own, and that right had been expressly limited by the agreement of March 10, 1917, wherein the parties had agreed to limit the use of that trade-mark ["Sun-Maid"] to raisins and raisin products. Consequently, the trustee in bankruptcy sold that right and no other. By its agreement to refrain from using the trade-mark 'Sun-Maid' on any other than raisin products, it acquired the unquestioned right, so far as the parties here involved were concerned, to the use of that trade-mark on raisin products. *The contract* of settlement of the divers claims of the parties to the use of the trade-marks 'Sun-Maid' and 'Sun-Kist' *was based upon mutual concessions as to doubtful claims. The appellee [defendant] has enjoyed the fruits of that contract ever since it was executed and has packed nearly \$250,000,000 worth of raisin products under the trade-mark 'Sun-Maid.' The appellee*



*having purchased the rights of one of the parties to the contract of March 10, 1917, cannot avoid the corresponding burden."*

By agreement dated September 20, 1950, plaintiff assigned its rights in the trade-mark "Sun-Kist" to California Fruit Growers Exchange (now Sunkist Growers, Inc.) for \$1,250,000 (R. 171-178).<sup>3</sup>

On December 14, 1954, defendant filed a motion in the district court to dissolve the permanent injunction, on the ground that plaintiff's said assignment of rights in the "Sun-Kist" mark justified abrogation of the 1917 contract and dissolution of the injunction based on defendant's limited ownership rights in the "Sun-Maid" mark. On January 30, 1956, the district court (Judge Hall) entered its order dismissing said motion without prejudice, on the ground that defendant had not sought leave of this Court, pursuant to whose mandate the injunction had issued.

Defendant appealed from said order on the ground that leave was not required, but in its brief also applied for leave to proceed in the district court. This Court dismissed defendant's purported appeal from the interlocutory order and, treating the proceeding as an application for leave, granted leave for a hearing on the merits of

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<sup>3</sup>Prior to such assignment, rights in the "Sunkist" mark for use on different products were shared by Sunkist Growers and plaintiff pursuant to terms of an agreement dated October 7, 1915 (R. 179-181); this agreement was approved in *California Fruit Growers Exch. v. Windsor Beverages* (7 Cir. 1941) 118 F.2d 149. Plaintiff used the mark in the form "Sun-Kist" and Sunkist Growers in the form "Sunkist," but these forms were regarded as equivalents (R. 152). The 1950 agreement supplanted the 1915 agreement.

the motion in the district court (*Sun-Maid R. Growers v. California P. Corp.* (9 Cir. 1957) 244 F.2d 895). The Court stated (p. 897):

“The permission to proceed in the District Court does not indicate that this Court has or expresses any opinion on the merits or the validity or invalidity of the motion. The District Court is left free to take such action as is just and proper.”

On June 4, 1958, defendant renewed its motion to dissolve the injunction, and moved in the alternative to join Sunkist Growers, assignee of plaintiff's rights in the “Sun-Kist” trade-mark, as a party to this proceeding. Defendant has never claimed that any condition or circumstance has changed since the permanent injunction issued except for the one fact that in 1950 plaintiff transferred its rights in the “Sun-Kist” mark to Sunkist Growers (Op.Br. 21).

The motion was heard by the Honorable Leon R. Yankwich, Chief Judge of the United States District Court for the Southern District of California. On July 7, 1958, Judge Yankwich handed down an opinion stating his reasons for refusing to dissolve the injunction or to join Sunkist Growers as a party to the proceeding (*California Packing Corp. v. Sun-Maid Raisin Gr., Etc.* (S.D.Cal. 1958) 165 F.Supp. 245; R. 85-106). Findings of fact, conclusions of law and a formal order denying the motion of defendant were duly entered (R. 109-112).

Findings of fact 4 through 11 were as follows (R. 110-111):

“4. The injunctive decree of June 15, 1936, was not based upon plaintiff's then existing rights of

ownership in the 'Sun-Kist' trade-mark, but upon plaintiff's rights and defendant's obligations under the contract of March 10, 1917.

5. The validity and effect of the contract of March 10, 1917, which compromised disputed claims, and of the injunctive decree of June 15, 1936, which enforced said contract, do not depend upon ownership by plaintiff of rights in the 'Sun-Kist' trade-mark.

6. Plaintiff has not assigned its rights under the contract of March 10, 1917, or under the injunctive decree of June 15, 1936.

7. By agreement dated September 20, 1950, plaintiff sold its rights in the 'Sun-Kist' trade-mark to California Fruit Growers Exchange, now Sunkist Growers, Inc.

8. The sale by plaintiff of its rights in the 'Sun-Kist' trade-mark did not terminate its rights under the contract of March 10, 1917.

9. There has not been any change in any material circumstance relating to the validity or enforceability of the contract of March 10, 1917, or the injunctive decree of June 15, 1936, since entry of said decree.

10. There is no evidence that the contract of March 10, 1917, or the injunctive decree of June 15, 1936, has foreclosed defendant from selling its products or any of them in any market, or that there is any lack of competition in the production and sale of fruit and vegetable products.

11. The effect on defendant of the injunctive decree of June 15, 1936, has not changed since its entry; today as in 1936 the injunction merely enforces the contract of March 10, 1917, and the limited ownership rights of defendant in the 'Sun-Maid'



trade-mark for use on raisins and raisin products only.”

Judge Yankwich explained the reasons for his findings in part as follows (emphasis by the court):

“It is axiomatic that the settlement of a disputed claim is a good consideration for an agreement to compromise. 1 C.J.S. Accord and Satisfaction § 4, p. 475” (165 F.Supp. 253).

“In truth, the final injunction issued was based upon one ground only, namely, that Sun-Maid’s predecessor *by contract* had limited itself to using the Sun-Maid trademark on raisins and raisin products only. So that, in reality, Sun-Maid is seeking now to be relieved of a contract from which courts repeatedly have declined to relieve them in the past” (165 F. Supp. 253-254).

“Under the guise of modifying the injunction, the defendant, in reality, is seeking to be relieved of the burdens of the contract. The detriments of which they now complain flow not *from the injunction*, but from the *contract* their predecessor entered into, and by which they are bound” (165 F.Supp. 254).

“Grant that a court of equity *may*, upon a clear showing of unforeseen and unanticipated conditions, modify an injunction. United States v. Swift & Co., 1932, 286 U.S. 106, 119, 52 S.Ct. 460, 76 L.Ed. 999. Nevertheless, that right does not extend to rights fully accrued upon facts so nearly permanent as to be substantially impervious to it:

“A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. \* \* \* The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as

to be substantially impervious to change.' United States v. Swift & Co., supra, 286 U.S. at page 114, 52 S.Ct. at page 462. California State courts have adopted and applied this principle. See Sontag Chain Stores Co. v. Superior Court, 1941, 18 Cal. 2d 92, 94-96, 113 P.2d 689; Woods v. Corsey, 1948, 89 Cal.App.2d 105, 113-114, 200 P.2d 208.

Here, nothing has happened except a change in the ownership of the mark which had formed the basis of the lawsuit which preceded the Agreement of March 10, 1917. To repeat, the injunction merely confirmed it and nothing has been produced at this hearing to indicate that the injunction

'has been turned through changing circumstances into an instrument of wrong.' United States v. Swift & Co., supra, 286 U.S. at page 115, 52 S.Ct. at page 462'' (165 F.Supp. 254).

"On the contrary, *it would be inequitable*, at the present time, when no other conditions exist, to relieve the defendant of the binding effect of its predecessor's contract.

Nor would it be fair to substitute a new party-plaintiff,—Sun-Kist Growers, Inc.,—which was not a party to the original litigation, and relitigate a judgment which has been final for over twenty years.

In truth, there is nothing left to litigate'' (165 F. Supp. 255-256).

Defendant has taken this appeal (R. 113) from the order denying dissolution of the permanent injunction (R. 112).

### THE ISSUES FOR DECISION.

Defendant contends that the injunction issued on the basis of plaintiff's ownership of rights in the "Sun-Kist" mark and that, when plaintiff assigned those rights, the basis for the injunction disappeared.

Plaintiff submits that such contentions are without support, and that defendant is fighting the facts and the law in a further effort to relitigate issues already determined against defendant. The record, including the findings of fact by Judge Yankwich and the prior decisions of this Court and of the Court of Customs and Patent Appeals, establishes that the injunction issued on the basis of the 1917 contract which divested defendant of rights of ownership in the "Sun-Maid" mark except for use on raisin products; that the validity of that contract has been finally determined; and that there has not been any material change of circumstance which could warrant dissolution of the injunction.

It is plaintiff's position that the order of the district court should be affirmed for the reasons that:

(a) Under the circumstances, the court did not have power to set aside the injunctive decree herein;

(b) Assuming that such power existed, the trial court correctly found that defendant had not proved any extreme and unexpected hardship arising from changed and unforeseeable conditions such as could justify setting aside the decree; and

(c) The trial court properly declined to require the joinder of Sunkist Growers, Inc., as a party to this proceeding.

### ARGUMENT.

A. THE COURT DID NOT HAVE POWER TO SET ASIDE THE INJUNCTIVE DECREE HEREIN WHICH PERMANENTLY ESTABLISHED PROPERTY RIGHTS AND IS NOT SUBJECT TO CHANGE.

The leading case on the law of modification of injunctive decrees is *United States v. Swift & Co.* (1932) 286 U.S. 106. In that case the United States Supreme Court stated that an injunction entered in a Government anti-trust suit was subject to modification on proper showing since it contemplated supervision of changing conduct and was thus provisional and tentative. The court distinguished such an injunction from one which merely gave protection to fully accrued rights. The court said (p. 114):

“A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. [Citing cases.] The distinction is between *restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change*, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.”

Another leading case, cited with approval in the *Swift* case, *supra*, is *Ladner v. Siegel* (1930) 298 Pa. 487, 148 Atl. 699. Stating the general rule of finality of equitable decrees, the court said (p. 701):

“There are many equitable proceedings that illustrate the general rule, *such as specific performance, bills to reform instruments, and others. A final decree in such equitable proceeding is unchangeable, except possibly through gross mistake to be corrected*



by a bill of review, and not then if any intervening right has appeared since entering the decree.”

The Supreme Court of California has cited the *Swift* and *Ladner* cases, *supra*, as the two leading cases on the distinction between decrees which give effect to fully accrued rights and provisional decrees which supervise changing conduct (*Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, 95).

The decree herein enforced a private contract which defined defendant's limited rights of ownership in particular property—the trade-mark “Sun-Maid.” At the time this Court directed issuance of the injunction on the basis of the 1917 contract, it stated (*California Packing Corporation v. Sun-Maid R. Growers* (9 Cir. 1936) 81 F.2d 674, 680):

“\* \* \* the rights of the parties were definitely settled by contract entered into between the appellant and the predecessors of the appellee. There is no uncertainty about it.”

The crucial circumstance before this Court then—as now—was that the 1917 contract divested defendant of ownership rights in the trade-mark “Sun-Maid” except for use on raisins and raisin products. This Court stated (p. 678):

“The appellee [defendant] limited its right of ownership in the trade-mark ‘Sun-Maid’ to the use of it in connection with raisins and raisin products. The contract so states. This view was adopted by the Court of Customs and Patent Appeals in litigation before that court between the parties hereto [*California Packing Corporation v. Sun-Maid Raisin Growers* of

California (Cust.&Pat.App.) 64 F.(2d) 370, 373], where the appellant [plaintiff] was contesting the right of the appellee to register the trade-mark 'Sun-Maid' as to other than raisin products. That court held that the contract of March 10, 1917, gave the Sun-Maid Company only limited ownership in the trade-mark 'Sun-Maid' and that it could not register the mark for any other product. The court said: 'If an applicant has by contract divested himself of ownership of and the right to use a mark for which he makes application for registration, he is not the "owner" of the mark. \* \* \* *Under the contract, appellee is not the owner of the mark, and was precluded from using the same as applied to such [nonraisin] goods.*' "

As Judge Yankwich concluded (165 F.Supp. 256):

"In truth, there is nothing left to litigate."

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**B. ASSUMING THAT POWER TO MODIFY EXISTED, THE TRIAL COURT CORRECTLY HELD THAT THERE WAS NO SHOWING OF EXTREME AND UNEXPECTED HARDSHIP ARISING FROM CHANGED AND UNFORESEEABLE CONDITIONS TO JUSTIFY DISSOLUTION OF THE DECREE.**

1. The trial court did not commit error, much less abuse its discretion, in finding that there had not been any change in any material circumstance affecting the injunctive decree.

Defendant has not established any basis for dissolution of the injunction. In the *Swift* case, supra, the United States Supreme Court stated the controlling legal principle in these terms (286 U.S. 119):

"There is need to keep in mind steadily the limits of inquiry proper to the case before us. We are not framing a decree. We are asking ourselves whether

anything has happened that will justify us now in changing a decree. *The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of re-adjusting.* \* \* \* No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. *Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation.*''

This Court recently quoted the above passage with approval in refusing to modify an injunction restraining the use of a trade name (*Morse-Starrett Products Co. v. Steccone* (9 Cir. 1953) 205 F.2d 244, 248).

The condition upon which this Court directed that the injunction issue in the first instance was defendant's limited rights of ownership in the "Sun-Maid" mark defined by the 1917 contract. The trial court correctly found that nothing has occurred since issuance of the decree to change that condition (Findings 4, 5, 9, 11; R. 110-111).

It is settled law that findings of fact by a trial court may not in any case be set aside unless clearly erroneous (Fed.Rules Civ.Proc., Rule 52(a); *Jacuzzi Bros. v. Berkeley Pump Co.* (9 Cir. 1951) 191 F.2d 632, 638; 5 Moore's Federal Practice, pp. 2609-2616). It is equally settled that determination of motions for modification or dissolution of prior decrees, where power to set aside the decree exists at all, is uniquely within the judicial dis-



cretion of the trial court, and such determination is reviewable on appeal only for abuse of discretion.

*Jackson v. Heiser* (9 Cir. 1940) 111 F.2d 310;

*Assmann v. Fleming* (8 Cir. 1947) 159 F.2d 332, 336;

7 Moore's Federal Practice, pp. 222-227.

In the *Jackson* case, *supra*, this Court affirmed the trial court's order refusing to set aside a judgment, and said (p. 313):

"In this, we cannot say that the court erred; much less that it abused its discretion."

And Moore's treatise, *supra*, summarizing a review of the authorities, states (p. 223):

"If the district court has power to grant relief, then its determination to grant or deny relief normally involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted: this matter, then, is largely within the judicial discretion of the trial court."

In this case, Judge Yankwich did not commit error, much less abuse his discretion, in determining that (Finding 9; R. 110-111):

"There has not been any change in any material circumstance relating to the validity or enforceability of the contract of March 10, 1917, or the injunctive decree of June 15, 1936, since entry of said decree."

2. The sole change in condition relied upon by defendant is the 1950 assignment by plaintiff of its rights in the "Sun-Kist" trade-mark; the trial court correctly found that this circumstance was not material to the continued validity of the 1917 contract or the injunctive decree.

Defendant argues that the injunction issued because of plaintiff's ownership rights in the "Sun-Kist" mark; that the injunction would not have issued if plaintiff had not owned such rights; and that when plaintiff assigned those rights to Sunkist Growers in 1950, this sole change of condition justifies dissolution of the injunction (Op. Br. 21).

The fundamental defect in defendant's contention is that the injunction did not issue because of plaintiff's ownership rights in the "Sun-Kist" mark, but because of the 1917 contract and defendant's consequent lack of ownership rights in the "Sun-Maid" mark. As this Court and the Court of Customs and Patent Appeals held, the 1917 contract divested defendant's predecessor of ownership rights in the "Sun-Maid" mark for use on products other than raisins and raisin products. Patently, no subsequent transfer by plaintiff of its rights in the "Sun-Kist" mark could give defendant greater rights of ownership in the "Sun-Maid" mark than defendant ever acquired from its predecessor.

The trial court found (Findings 4, 5, 8; R. 110):

"4. The injunctive decree of June 15, 1936, was not based upon plaintiff's then existing rights of ownership in the 'Sun-Kist' trade-mark, but upon plaintiff's rights and defendant's obligations under the contract of March 10, 1917."

"5. The validity and effect of the contract of March 10, 1917, which compromised disputed claims,

and of the injunctive decree of June 15, 1936, which enforced said contract, do not depend upon ownership by plaintiff of rights in the 'Sun-Kist' trade-mark."

"8. The sale by plaintiff of its rights in the 'Sun-Kist' trade-mark did not terminate its rights under the contract of March 10, 1917."

Explaining its findings, the trial court stated (165 F. Supp. 253-254):

"In truth, the final injunction issued was based upon one ground only, namely, that Sun-Maid's predecessor *by contract* had limited itself to using the Sun-Maid trademark on raisins and raisin products only. So that, in reality, Sun-Maid is seeking now to be relieved of a contract from which courts repeatedly have declined to relieve them in the past" (emphasis by the court).

And with particular reference to the lack of significance of plaintiff's ownership or nonownership of rights in the trade-mark "Sun-Kist" to validity of the contract defining defendant's rights in the trade-mark "Sun-Maid," the trial court stated (165 F.Supp. 255, n. 1):

"And we may disregard entirely the fact that it [the 1917 contract] stemmed from the settlement of a lawsuit involving the alleged infringement of the plaintiff's trademark Sun-Kist. For, if the plaintiff's predecessor, without possessing any mark of its own, had, for adequate consideration, entered into an agreement with the defendant's predecessor in which they agreed *not to use* Sun-Maid on any product other than raisins and raisin products, the contract would be just as effective" (emphasis by the court).

We submit that not only were the foregoing findings correct and within the discretion of the trial court but indeed that any other findings would have been in the teeth of this Court's original decision.

3. The trial court correctly held that there was no showing of extreme and unexpected hardship on defendant and that, on the contrary, dissolution of the injunction would destroy contract rights of plaintiff.

Under the settled rule of the *Swift* case (quoted at pp. 15-16, supra), to justify dissolution of the injunctive decree defendant must not only show changed conditions, but must also make a "clear showing of grievous wrong" and of "extreme and unexpected" hardship arising from such changes. Here, defendant is not suffering from any restriction whatever other than that originally established by the 1917 contract and affirmed by the injunctive decree entered pursuant to mandate of this Court. Now, as when the decree issued (and as when the contract was made), defendant simply does not have ownership rights in the "Sun-Maid" mark except for use on raisins and raisin products (Finding 11; R. 111).

Defendant is not seeking relief from an oppressive injunction as a result of changed conditions, but rather relief from the express terms of a contract binding upon it. Stripped of pretense, defendant's objective is to overturn the prior decision of this Court. Notwithstanding previous rulings that defendant was bound by the contract of March 10, 1917, and was not the owner of the trade-mark "Sun-Maid" except for use on raisins and raisin products, defendant, through the device of a



motion to dissolve the injunction, seeks to evade the contract and assert greater rights of ownership.

As the trial court observed (165 F.Supp. 254):

“Under the guise of modifying the injunction, the defendant, in reality, is seeking to be relieved of the burdens of the contract. The detriments of which they now complain flow not *from the injunction* but from the *contract* their predecessor entered into, and by which they are bound. \* \* \*

\* \* \* \* \*

\* \* \* Here nothing has happened except a change in the ownership of the mark which had formed the basis of the lawsuit which preceded the Agreement of March 10, 1917. To repeat, the injunction merely confirmed it and nothing has been produced at this hearing to indicate that the injunction

‘has been turned through changing circumstances into an instrument of wrong.’ United States v. Swift & Co., *supra*, 286 U.S. at page 115, 52 S.Ct. at page 462” (emphasis by the court).

Put another way, defendant is saying no more than that since it has complied with the injunctive decree for a number of years it should now be excused. In *Walling v. Harnischfeger Corporation* (E.D.Wis. 1956) 142 F.Supp. 202, affirmed (7 Cir. 1957) 242 F.2d 712, defendant moved to dissolve an injunction entered twelve years previously, on the ground that it had fully complied with the terms of the injunction over the years and that other changes in the business had occurred. The court refused to dissolve the injunction and stated (p. 204):

“Would a modification serve ‘to effectuate or thwart the basic purpose of the original decree’

which was to permanently restrain certain conduct? Applying that test one cannot say vacating the judgment would serve to effectuate the basic purpose of that decree. This court is not convinced that a sufficient showing has been made to comply with the test [of changed condition] laid down in *United States v. Swift & Co.*, *supra*.

\* \* \* *Certainly compliance with the decree cannot be said to be such a changed condition.*”

See also:

*Morse-Starrett Products Co. v. Steccone* (9 Cir. 1953) 205 F.2d 244, 248.

The purpose of the decree herein was to finally establish defendant's limited ownership rights in the “Sun-Maid” mark in accordance with the provisions of the 1917 contract. Dissolution of the injunction would obviously thwart and not effectuate that purpose, and would also, in effect, destroy plaintiff's contract rights.

Defendant has endeavored to obscure its controlling lack of ownership rights in the trade-mark “Sun-Maid,” and the complete absence of any new and extreme hardship on defendant, by arguing either that plaintiff relinquished its rights under the 1917 contract when it assigned its rights in the trade-mark “Sun-Kist,” or that the contract has become an unlawful restraint of trade (Op.Br. 10-21).

These arguments must stand or fall on defendant's premise that the 1917 contract (and the injunction which enforced it) was a covenant ancillary to plaintiff's rights in the trade-mark “Sun-Kist.” This premise is squarely contrary to the findings of fact of the trial court (Findings

4, 5, 8; R. 110; quoted at pp. 18-19, *supra*), and without support in the record. Defendant's arguments necessarily fall with the false premise.

To make defendant's attempted analogy of the 1917 contract to an ancillary covenant accompanying sale of a business (Op.Br. 15) fit at all, defendant would have to show that defendant had sold plaintiff the "Sun-Kist" mark for use in a nonraisin business (covenanting not to use the trade-mark "Sun-Maid" in any nonraisin business); and that plaintiff thereafter transferred or abandoned its nonraisin business. There are no such facts. In the 1917 agreement defendant's predecessor did not sell the "Sun-Kist" mark or any business to plaintiff or its predecessor (R. 15-21). Plaintiff (and its predecessor) was at that time already engaged in a nonraisin business (packing and selling canned fruits and vegetables) in connection with which it used the trade-mark "Sun-Kist" among other marks; and plaintiff has engaged continuously in such business to this date (R. 122, 179).

As the trial court found, the 1917 contract was an independent settlement agreement. Defendant's tortured ancillary covenant argument is merely a renewed effort by defendant to construct a theory to evade a contract which this Court has previously held binding upon it.

4. Plaintiff has subsisting rights in the 1917 contract which entitle it to the continued protection of the injunctive decree.
- (a) Plaintiff gave ample consideration for the settlement agreement under which defendant has received great benefits.

The injunctive decree herein established the validity and interpretation of a contract compromising an action in-



volving trade-mark infringement and related issues (Finding 3; R. 109-110). Plaintiff and its predecessor agreed to and did withdraw the suit then pending in a New York Federal District Court. Plaintiff agreed to and did permit defendant and its predecessor to use the trade-mark "Sun-Maid" on packages containing raisins or raisin products free of any further interference. The parties agreed to continue certain agreements and leases relating to the packing and marketing of raisins and facilities therefor. In consideration thereof, ownership rights in the "Sun-Maid" mark were limited to raisins and raisin products. If the injunction were dissolved, plaintiff would be deprived of contract rights for which it gave ample consideration, and defendant would take the benefits received under the contract free of corresponding burdens (Findings 12, 13; R. 111). In its decision directing entry of the injunction this Court observed that by 1936 defendant had already packed about \$250,000,000 worth of raisin products under the trade-mark "Sun-Maid" (81 F.2d 676). See also *Hughes Tool Co. v. A. F. Spengler Co.* (N.D.Okl. 1947) 73 F.Supp. 156.

In addition to the basic rights of plaintiff in the 1917 contract for which it has given valuable consideration, other factors reflect the continuing interest of plaintiff in the contract and the injunction.

- (b) Plaintiff's contract rights were not and are not mere adjuncts of, or a fragment of the goodwill relating to, ownership rights in the trade-mark "Sun-Kist."

The trial court found that when plaintiff sold its rights in the trade-mark "Sun-Kist" it did not assign its rights under the 1917 contract or the injunctive decree (Finding

6; R. 110). In the face of this adverse finding of fact, defendant nevertheless argues that plaintiff necessarily abandoned or transferred its contract rights with the trade-mark rights (Op.Br. 10-14). This contention assumes, contrary to the facts, that the 1917 contract was a mere ancillary covenant, or mere part of the goodwill, attached to plaintiff's rights in the trade-mark "Sun-Kist." In fact, there was no concurrent transfer of the "Sun-Kist" mark at the time the contract was made. As far as continuing business interests are concerned, plaintiff has been engaged in the packing of fruits and vegetables since prior to 1917 right down to date. The trial court properly found that the contract, a compromise agreement resolving disputed business claims, remained unaffected by subsequent sale of plaintiff's rights in one trade-mark (Findings 1, 4, 5, 8; R. 109-110).

Defendant is, again, fighting the facts. And see, on the law, *Bowdil Company v. Central Mine Equipment Company* (8 Cir. 1954) 216 F.2d 156, 159-160, certiorari denied (1955) 348 U.S. 936.

(c) The 1917 contract was not and is not an illegal restraint of trade.

Defendant also argues that the 1917 contract has become<sup>4</sup> an illegal restraint of trade—a "restrictive covenant" limiting use of the "Sun-Maid" mark to raisin products, no longer ancillary to a lawful "main purpose" of the contract, which purpose according to defendant was

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<sup>4</sup>Defendant concedes that the contract was valid when made, and at the time this Court enforced it by ordering entry of the injunction herein (Op.Br. 7-8).

protection of plaintiff's rights in the trade-mark "Sun-Kist" (Op.Br. 18-21). This argument is untenable for several reasons.

The 1917 contract divested defendant's predecessor of any rights in the trade-mark "Sun-Maid" except as used on raisin products. Such definition of property rights was part of a settlement agreement and was not ancillary to any sale of rights in the trade-mark "Sun-Kist" or other property. Defendant was not and is not subject to a "restrictive covenant"; the plain fact is that defendant never owned or acquired the trade-mark "Sun-Maid" except for use on raisin products.

The 1917 contract was not and is not an illegal restraint of trade for the further reason that it does not prevent defendant from selling its products in any competitive field.<sup>5</sup> The trial court found (Finding 10; R. 111):

"There is no evidence that the contract of March 10, 1917, or the injunctive decree of June 15, 1936, has foreclosed defendant from selling its products or any of them in any market, or that there is any lack of competition in the production and sale of fruit and vegetable products."

The only effect of the agreement is to define defendant's ownership rights in one trade-mark, leaving defendant wholly free to sell whatever products it chooses under any other name or mark to which it is lawfully entitled.

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<sup>5</sup>This Court previously rejected the "illegal restraint" defense to enforcement of the contract, originally offered by defendant in its answer to the complaint herein (R. 59), when it directed entry of the injunction.

As the trial court stated in its opinion (165 F.Supp. 250-251):

“Even when the right to trade is limited, there is no anti-trust violation in an agreement unless it result in an unreasonable restraint. [Citing authorities.]

So, even if the agreement of March 10, 1917, had the effect of preventing Sun-Maid's predecessor, and consequently Sun-Maid, from engaging in the production and marketing of products other than raisins and raisin products, the monopolistic feature would not be a violation of law or public policy without an actual showing that there were no others in the field engaging in the production and sale of products competitive to those of the plaintiff. However, the agreement is much narrower. It *does not* prevent Sun-Maid from engaging in the production of canned products of fruits and vegetables other than raisin and raisin products. It merely *restricts* the use of the trademark Sun-Maid to such products. Sun-Maid's predecessor *was free*, and Sun-Maid itself *has been free* all these years, to can anything,—vegetables or fruits,—and *market them* under any name so long as that name is not Sun-Maid” (emphasis by the court).

The cases relied upon by defendant (Op.Br. 19-20) all concern ancillary covenants which *prevented all subsequent competition* between the agreeing parties. The contract in question patently does not prevent defendant from selling goods in competition with those of plaintiff or of anyone else; there is no evidence in this record that the limitation upon defendant's use of a particular trade-mark has foreclosed it from any market. The legality of contracts which merely limit use of a trade name and do not



otherwise restrict competition between the parties is well established.

*Chester H. Roth, Inc. v. Esquire, Inc.* (2 Cir. 1951)  
186 F.2d 11, certiorari denied (1951) 341 U.S.  
921;

*E. F. Prichard Co. v. Consumers Brewing Co.* (6  
Cir. 1943) 136 F.2d 512, 522, certiorari denied  
(1943) 321 U.S. 763;

*California Fruit Growers Exch. v. Windsor Bever-  
ages* (7 Cir. 1941) 118 F.2d 149;

*John Rissman & Son v. Gordon & Ferguson* (D.  
Minn. 1948) 78 F.Supp. 195;

*Guth v. Guth Chocolate Co.* (4 Cir. 1915) 224 Fed.  
932, affirming (D.Md. 1914) 215 Fed. 750, cer-  
tiorari denied (1915) 239 U.S. 640;

*Kellogg v. Kellogg Toasted Corn Flake Co.* (1940)  
212 Mich. 95, 180 N.W. 397, 402;

*Frazer v. Frazer Lubricator Co.* (1887) 121 Ill. 747,  
13 N.E. 639;

*Probasco v. Bouyon* (1876) 1 Mo.App. 241;

*Waukesha H. M. Springs Co. v. Hygeia S. D. Wa-  
ter Co.* (7 Cir. 1894) 63 Fed. 438;

*Hamilton, Brown Shoe Co. v. Sam B. Wolf Sons  
Co.* (Ct.Cust.&Pat.App. 1930) 39 F.2d 272.

In *Probasco v. Bouyon*, supra, the court granted an in-  
junction restraining defendant Oakes, who had sold his  
trade name together with a candy manufacturing busi-  
ness, from using the name in connection with a new candy-  
making venture. The court said (p. 246):

“A court of equity will restrain a breach of con-  
tract or of covenant, and to do so in this case will

not be against public policy or in restraint of trade. *Oakes may still make and sell candy, but not under the name the use of which he has for this purpose sold.*”

In the *Guth* case, supra, on similar facts the Fourth Circuit affirmed the granting of an injunction restraining defendant's use of a trade name with which he had parted. The court said (224 Fed. 934):

“When, in 1909, Guth sold, among other things, ‘the use of the name Guth for the purpose of manufacturing and selling candies under the Guth label,’ he dispossessed himself of the right thereafter to use his name as a trade-mark, and no valid reason appears for not holding him to his obligation. \* \* \* *Stripped of all pretenses, what he really seeks to do is to keep for himself the essential thing he sold, and also keep the price he got for it.*”

As in the *Guth* case, defendant's only real complaint is that the injunction compels it to live up to the bargain by which it is bound. Defendant wants to retain the consideration received under the contract, and at the same time claim rights in the “Sun-Maid” mark in violation of the express terms of the contract.

As the trial court found (Finding 11; R. 111):

“The effect on defendant of the injunctive decree of June 15, 1936, has not changed since its entry; today as in 1936 the injunction merely enforces the contract of March 10, 1917, and the limited ownership rights of defendant in the ‘Sun-Maid’ trade-mark for use on raisins and raisin products only.”

An injunction which merely enforces a contract between experienced business men relating to rights in a single

trade-mark is not equitably subject to dissolution (see *United States v. Swift & Co.* (1932) 286 U.S. 106, 115; *Hughes Tool Co. v. A. F. Spengler Co.* (W.D.Okl. 1947) 73 F.Supp. 156). The trial court succinctly observed (165 F.Supp. 255):

“On the contrary, *it would be inequitable*, at the present time, when no other conditions exist, to relieve the defendant of the binding effect of its predecessor’s contract” (emphasis by the court).

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**C. THE TRIAL COURT CORRECTLY HELD THAT JOINDER OF SUNKIST GROWERS, INC., AS A PARTY TO THIS PROCEEDING WAS NOT NECESSARY OR DESIRABLE.**

For all the reasons previously stated, plaintiff’s continuing rights under the 1917 contract—which it did not assign to Sunkist Growers in 1950 when it assigned its rights in the trade-mark “Sun-Kist”—make plaintiff the proper party to oppose dissolution of the injunction which protects its contract rights. In the trial court plaintiff neither urged nor opposed joinder of Sunkist Growers, taking the position that in any event plaintiff was entitled to continuance of the injunction. The least that can be said is that the trial court was within its discretion in determining that under the circumstances Sunkist Growers was not a necessary or proper party to this proceeding (Finding 14, Conclusion 4; R. 111-112). The trial court commented (165 F.Supp. 256):

“Nor would it be fair to substitute a new party-plaintiff,—Sun-Kist Growers, Inc.,—which was not a party to the original litigation, and relitigate a judgment which has been final for over twenty years.”



It may, however, be pertinent to note that dissolution of the injunctive decree would also adversely affect the interests of Sunkist Growers. It is well settled that intervening equities and the interests of third persons and of the public may be considered in determining any requested modification of an injunctive decree (7 Moore's Federal Practice, p. 225; Restatement, Torts, sec. 942).

Sunkist Growers acquired plaintiff's rights in the trademark "Sun-Kist" in 1950 for \$1,250,000 (R. 171-178). Contrary to defendant's assertions of lack of interest by Sunkist Growers (Op.Br. 26), the record demonstrates that Sunkist Growers is manifestly interested in plaintiff's protection of the 1917 contract and the injunctive decree. F. R. Wilcox, general manager of Sunkist Growers, testified (R. 153-154):

"Q. Since the acquisition of the rights under the 1950 agreement has Sunkist Growers increased and expanded its use of the Sunkist mark?

A. Oh, yes.

Q. That increased use of the Sunkist mark has been on what products?

A. It has been on what we call or normally classify as citrus products which includes a large range of products that are normally made from citrus fruits.

Q. It includes canned products? A. Yes.

Q. Prior to 1950 did Sunkist Growers use the mark on canned products? A. No.

Q. You stated a moment ago that the existence of the injunction which Calpack had against Sun-Maid was taken into consideration by Sunkist Growers in making the 1950 purchase of rights. Has there been any circumstance which has occurred since 1950 up to the present time which has eliminated the significance of the injunction to Sunkist Growers?

A. No. Not that I can think of, sir.

Q. In that connection circumstances have stayed the same from 1950 until today?

A. Yes. The only change has been the one we have referred to earlier which is the extension of the use of the trade-mark by Sunkist since that time.

May I state also that that extension of the use of the trade-mark has not only been domestic but also in foreign markets as well where we have registered four products in a number of foreign markets, both actual markets and potential markets.

Q. As general manager of Sunkist Growers would you want to see the Sun-Maid mark used on citrus products? A. No.

Q. Do you feel there might be elements of confusion or possibly impairment of Sunkist sales position in such usage? A. Yes."

Thus, in addition to all other circumstances, there is the threat of trade-mark confusion and unfair competition, with detriment to the intervening interests of Sunkist Growers and to the public, if the injunction were now to be set aside.

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### CONCLUSION.

The injunctive decree herein, originally entered pursuant to the mandate of this Court, upheld the validity of the 1917 contract, settled defendant's limited ownership rights in the trade-mark "Sun-Maid" for use on raisin products only, and permanently enjoined defendant from using the trade-mark on other products. Defendant has now seized upon an irrelevant circumstance as an excuse to renew its efforts to claim rights of ownership in the

trade-mark "Sun-Maid" beyond those it initially acquired from its predecessor, and beyond those established by the prior decisions of this Court and the Court of Customs and Patent Appeals. Defendant has failed to show that continued obedience to its contractual obligations and to the injunctive decree is oppressive or even unfair. On the contrary, as the trial court found, destruction of plaintiff's contract rights would be inequitable. The trial court properly refused to permit defendant to relitigate issues settled adversely to its contentions, and to evade a contract heretofore held binding upon it.

Plaintiff respectfully submits that the order of the district court denying dissolution of the injunctive decree should be affirmed.

Dated, April 30, 1959.

MARSHALL P. MADISON,  
JAMES MICHAEL,  
GEORGE A. SEARS,  
*Attorneys for Appellee California  
Packing Corporation.*

PILLSBURY, MADISON & SUTRO,  
*Of Counsel.*

